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IN THE

Supreme Court of the United States

October Term 1970
No. 1555

CARL O. OLDENKOTT,

Respondent,

vs.

AMERICAN ELECTRIC, INC.,

Petitioner.

Brief in Opposition to Granting of Petition for Writ of Certiorari.

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California Rules of Court, Rule 19 2

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Carl O. Oldenkott, Respondent to the petition for writ of certiorari to the California Court of Appeal for the Fourth Appellate District, opposes the granting of the petition.

Jurisdiction.

This Court is considered to be without jurisdiction to review on writ of certiorari a decision by the Court of Appeal for the Fourth Appellate District, State of California, that involved breach of an employment agreement. The employment agreement was in no way concerned with a patent, trademark or copyright, nor a federal statute. The Court of Appeal for the Fourth Appellate District in the decision below did not de-

cide said question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court. The decision below on which review is sought does not involve subject matter coming within the scope of Rule 19 of this Court.

Grounds of Opposition.

The decision of the Court of Appeal for the Fourth Appellate District, State of California is not in conflict with this Court's decision in *Lear, Inc. v. Adkins,* 395 U.S. 653, for the Court of Appeal for the Fourth Appellate District has not decided an important question of federal law which has not but should be settled by this Court, nor has it decided a federal question in a way in conflict with applicable decisions of this Court.

The Court of Appeal for the Fourth Appellate District has simply affirmed a decision of the Superior Court of Orange County, State of California that held that a written employment agreement between Petitioner and Respondent had been breached by Respondent. Said employment agreement was in no way concerned with patents, trademarks or copyrights.

The Petitioner presents no sound reasons which should move this Court to exercise its discretion in favor of review of the decision below that involves no federal question.

Questions Presented.

Whether the Court of Appeal for the Fourth Appellate District, State of California, erred in refusing to give retroactive effect to this Court's holding in *Lear, Inc. v. Adkins,* 395 U.S. 653 in a breach of an em-

ployment agreement case before it on appeal, which case did not involve a patent, trademark or copyright.

Statement of the Case.

On December 29, 1967 Petitioner, by a written Employment Agreement employed Respondent as manager of its division known as Oldenkott Fasteners for a term of two years, which term could be extended an additional two years at the option of Respondent.

Simultaneously, by a written Patent License Agreement, Respondent granted Petitioner the right and license to manufacture, sell, produce and distribute fasteners covered by an issued patent and an application for a patent.

On July 19, 1968 Petitioner terminated Respondent's employment. Thereupon Respondent sued Petitioner to recover damages, alleging termination of his employment was an anticipatory breach of contract. Petitioner asserted it was authorized by the terms of the contract to terminate Respondent's employment because of his failure to comply therewith, and also because of his refusal to perform duties assigned him by Petitioner. The case was tried by a jury which found in Respondent's favor and awarded him damages in the sum of $85,000. Pursuant to stipulation, the amount of the award was reduced to its agreed present value, the sum of $79,055.56.

The California Court of Appeal for the Fourth Appellate District affirmed the decision of the trial court on the Employment Agreement on January 8, 1971, 14 Cal. App. 3d 198 (1971), a copy of which decision appears in the Appendix to Appellant's Petition for a Writ of Certiorari.

The Court of Appeal denied Petitioner's Petition for Rehearing on January 26, 1971.

The California Supreme Court denied Petitioner's Petition for Hearing on March 3, 1971.

On December 19, 1968, Petitioner commenced Action 164173 in the Superior Court of the County of Orange against Respondent and his corporation to rescind the Patent License Agreement entered into simultaneously with the Employment Agreement, a copy of which was in evidence in this case.

The jury in Action No. 164173 found the patents licensed to Petitioner not patentable over the prior art by virtue of its answers to special interrogatories submitted to it, on June 2, 1970, and that no royalties were due Respondent by Petitioner in view of *Lear, Inc. v. Adkins.*

Petitioner's Action No. 164173 to rescind the License Agreement was filed December 19, 1968 well over five months after Respondent was terminated as an employee on July 19, 1968.

ARGUMENT.

The Court Below Did Not Err in Refusing to Give Retroactive Effect to Lear, Inc. v. Adkins.

Petitioner attempts to consolidate the conditions of the Employment Agreement with those of the Patent License Agreement, and then use the case of *Lear, Inc. v. Adkins,* 395 U.S. 653, to substantiate Petitioner's position that it may now attack the Employment Agreement.

The Employment Agreement was simply one that set forth the terms of Respondent's employment, and made no reference to the fastener patents or to the validity thereof.

The License Agreement related solely to the patent rights granted Petitioner under Respondent's patent and patent application.

Obviously the *Lear, Inc. v. Adkins* decision has no application to a straight employment agreement, retroactive or otherwise.

Paragraph V of the Employment Agreement, pursuant to which Oldenkott had been terminated, provided in paragraph (B) thereof:

> "(B) In addition to the foregoing, this Agreement and all rights of Oldenkott thereunder may at the option of AEI be terminated by AEI at any time during the initial term of any renewal thereof upon the happening of any of the following

events or conditions:

. . .

"(5) Termination of an Exclusive License Agreement among AEI, Oldenkott, Oldenkott Fasteners, Inc. and Oldenkott International, Inc. of even date herewith." [Pltf. Ex. 2, pp. 2-3].

Paragraph (B)(5) has no relevancy or materiality to the present appeal, for Respondent did not rescind the License Agreement until well over five months after it breached the Employment Agreement.

The patents were not intended to be included in the Employment Agreement, for if they were, there would be no necessity, reason or use for the License Agreement.

REASONS FOR DENYING THE WRIT.

The Decision of the Court of Appeal Does Not Conflict With Numerous Lower Court Decisions According Complete Retroactive Effect to the Decision of Lear, Inc. v. Adkins.

The decision of the Court of Appeal was directed to the breach of the Employment Agreement which was in no way concerned with patents, trademarks or copyrights, or any federal statute. Each of the lower court decisions referred to by Petitioner on pages 8 and 9 of its brief concerned a license agreement involving a patent or copyright to which *Lear, Inc. v. Adkins* was relevant. The Employment Agreement was in no way concerned with a patent or copyright license or any federal statute. The Court of Appeal accordingly did not consider the lower court decisions as relevant or material to the Employment Agreement. There is no conflict between the Court of Appeal decision and the lower court decisions cited by Petitioner on pages 8 and 9 of its brief.

The Granting of Certiorari Herein Is Not Necessary for the Court to Resolve the Uncertainty Raised by Its Decision in Standard Industries v. Tigret Industries, 397 U.S. 586 (1970).

The question above raised by Petitioner is hypothetical and not necessary to be resolved to determine that Petitioner's Writ of Certiorari should be denied. It is basic that this Court does not review hypothetical questions.

Conclusion.

The decision of the Court of Appeal is concerned with an employment agreement and is in no way related to patents, trademarks or copyrights or involving a federal statute. For the reasons previously mentioned, a writ of certiorari to review the judgment and opinion of the California Court of Appeal for the Fourth Appellate District should be denied.

Respectfully submitted,

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